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IN THE

Supreme Court of the United States

OCTOBER TERM 1965

No. 306

ROCHESTER GAS AND ELECTRIC CORPORATION,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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This Brief is submitted by Petitioner in reply to the Brief for the Federal Power Commission (Commission) in opposition to a Petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

The Petition presents to this Court *for the first time* the question whether "navigable waters", as used in the Federal Power Act (Act) means only what the Act (§3(8)) defines it to mean, or whether it includes also other criteria of "navigable waters" stated by this Court in *United States* v. *Appalachian Electric Power Co.*, 311

U. S. 377 (1940), a case which arose under the River and Harbor Act of 1899, which did not involve an interpretation of, and did not purport to interpret §3(8) of the Federal Power Act.

The acceptance by the Court below of *past* use or suitability for use as a criterion of "navigable waters" was the sole basis for its sustaining the Commission's finding that Petitioner's hydroelectric plants on the Genesee River in Rochester are on "navigable waters" under the Act. In accepting this criterion despite the fact that "for the purposes of this Act" §3(8) defines "navigable waters" and does not include this criterion, the Court relied exclusively on *Appalachian.*

The question of first impression in this Court here presented is one of great importance, because on its decision depends the scope and extent of the Commission's jurisdiction to license hydroelectric projects in "navigable waters". If the criteria of "navigable waters" judicially stated in *Appalachian,* but unstated in §3(8) of the Act, may nevertheless be engrafted on §3(8), the expanded jurisdiction of the Commission would extend to many hydro projects on streams which are not "navigable waters" under the expressed criteria of §3(8). We again note how apposite is this Court's recent statement in *Federal Power Commission* v. *Union Electric Company,* 85 Sup. Ct. 1253, 1255 (May 3, 1965):

> "• • • Because the question is an unresolved one of jurisdiction over an important class of hydroelectric projects, we granted certiorari, 379 U. S. 812, • • •".

The Brief in Opposition is noteworthy for the issues it does *not* raise, the arguments it does *not* meet, and for statements which have no support other than that they

are sponsored by the Solicitor General. The factual base and legal arguments for granting the writ stated in the Petition are virtually undisputed.

The far-reaching effect of the decision below, as stated in the Petition, and above, *is not disputed.*

That this Court has recognized that the Courts may elaborate the meaning of a statutory term which is *not* defined by the statute,[1] *is not disputed.*

That this Court, conversely, has held that where a statutory term is defined in the statute, *indeed in the very section of the Act we are here concerned with,* the Courts must give effect to the Congressional definition,[2] *is not disputed.*

That the Court below relied exclusively on *Appalachian* in applying past use or suitability for use as a criterion of "navigable waters" as defined in §3(8) *is not disputed.*

That *past* use or suitability for use are criteria of "navigable waters" announced in *Appalachian,* but unstated in §3(8) of the Act, *is not disputed.*

That this Court in *Appalachian* did not purport to interpret §3(8) or any other provision of the Act *is not disputed.*

That this Court in *Appalachian* declared the scope of "navigable water" as an undefined term in its broadest constitutional sense, *is not disputed.*

If we add up what is not disputed it amounts to this: In a case of first impression in this Court involving an unresolved question of jurisdiction over an important class of hydroelectric projects, it appears that the decision of the Court below rests on a clear misapplication of a decision of this Court. Surely this requires that the writ be granted.

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1. *United States* v. *California,* 85 Sup. Ct. 1401 (May 17, 1965).
2. *Federal Power Commission* v. *Tuscarora Indian Nation,* 362 U. S. 99 (1960).

But notwithstanding the foregoing, the Brief in Opposition states that there is no occasion for further review because:

> "The decision below is supported by uniform rulings in several courts of appeals and is consistent with, if not actually required by, prior decisions of this Court." (p. 4)

This statement does not provide a valid reason for denying the writ.

That other lower courts have also misconstrued *Appalachian* is an excellent reason for granting the writ, so that this Court may correct their error. In the Petition, pages 13-16, the cases cited by the Court below as precedents for relying on *Appalachian* are examined in detail, and on the basis of such examination are shown to have no precedential value. The Brief in Opposition avoids any discussion of the legal basis for this conclusion, but would dismiss it with a wholly gratuitous and unsupported *ipse dixit*: "But this contention is plainly without merit" (p. 5). The plain fact is, the merit of the contention is really uncontroverted.

The statement in the Brief in Opposition that the decision below "is consistent with, if not actually required by, prior decisions of this Court", is another wholly gratuitous and unsupported *ipse dixit*. No prior decision of this Court is cited as consistent with the decision below. No prior decision of this Court is cited as requiring the decision below. But the fact that there are prior and subsequent decisions of this Court *inconsistent* with the decision below, which were cited and discussed in the Petition (pp. 17-19), is ignored by the Brief in Opposition; and that fact thus stands out as undisputed.

That this Court has recognized that the Act is the outgrowth of conservationist efforts to promote develop-

ment of water resources to the full extent of federal power,[3] or that in the Act Congress has exercised full authority over navigation,[4] does not support the conclusion that "navigable waters" as defined in the Act "is thus the same as that stated by this Court in the *Appalachian* case * * *" (Br. in Opp., p. 6). It does support the contrary. As discussed in the Petition (pp. 9-13), the broadest scope of Congressional authority over navigation is *all* waters of the United States, navigable or not, over which Congress has jurisdiction under the commerce clause. Congress has exercised its full power in the Act by dealing separately with "navigable waters" as defined, and with "other than those *defined herein as navigable waters*" (Act, §23(b), Petition, p. 26a). If "navigable waters" in the Act had not been a defined term, it would properly have been given its broadest meaning in a constitutional sense, as was done by this Court in *Appalachian* with the undefined term in the River and Harbor Act of 1899. Likewise, in that event the subject of the remaining power would have been "non-navigable" waters. The fact that Congress specifically dealt with waters "other than those defined herein as navigable waters" emphasizes that "navigable waters", as defined, was intended to cover no more than the definition stated, and all waters not so covered were to be dealt with otherwise.

The exercise of Commission jurisdiction over "navigable waters" as defined, and other waters, is not the same.

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3. *First Iowa Hydro-Electric Coop.* v. *Federal Power Commission*, 328 U. S. 152, 180. The rationale of this opinion, in any event, is not applicable to the Section 3(8) definition of "navigable waters" which reflects a *"compromise"* between the competing forces of the conservationists and their opponents. The Commission's opinion in the *Union Electric* case, 27 FPC 801, 805, makes this clear.

4. *Federal Power Commission* v. *Union Electric Co.*, 85 Sup. Ct. 1253.

The Commission bases its jurisdiction in this case on "navigable waters", as defined. It cannot sustain it on the basis of a different jurisdiction over *other* than "navigable waters", as defined.

The Brief in Opposition states that the legislative history of the Act supports the view that "navigable waters" as used in the Act is as broad as in the River and Harbor Act of 1899. The only specific references to legislative history relate to the 1935 amendment to §23(b). Even the snatches referred to do not support the statement. The fact is that the 1935 amendment reiterated the significance of "navigable waters" as a defined term by dealing also with waters *"other than those defined* therein as navigable waters". The legislative history of §3(8) makes abundantly clear an intention to legislate specific and limited criteria of "navigable waters", rather than accept judicial criteria.

The Brief in Opposition concludes with a strange suggestion that it is doubtful whether Petitioner's "present objection to the Commission's order" may be litigated because it was not raised "in its application for administrative rehearing" (Br. in Opp., p. 7). If by "present objection" is meant, that the evidence before the Commission did not support the finding[5] on which it is based, of course that objection was raised. If by present objection is meant the objection that criteria of "navigable waters" stated in *Appalachian,* but unstated in §3(8), may not properly be engrafted on §3(8), the objection was not raised; for there was no reason to do so. And when there is no reason to raise an objection on application

5. The Commission found that the Genesee River at the location of all of Petitioner's projects "is a 'navigable water of the United States' within the meaning of subsection 23(b) of the Act" (Petition, p. 16a).

for rehearing, it may properly be considered on review. Act, §313(b) (Petition, p. 27a); *Public Utility District No. 1* v. *Federal Power Commission,* 242 F. 2d 672, 677 (9th Cir., 1957).[6]

It must be remembered that the Commission held no hearing before making its order. The Order was quite obviously based on §3(8), which was quoted in full. The only judicial authorities mentioned, which included *Appalachian,* were cited to the proposition, expressly stated in §3(8), that navigability of a watercourse is not destroyed by natural obstructions. There was thus no reason for Petitioner, in applying for a rehearing, to object to the misapplication of *Appalachian* which the Commission first suggested in its order denying rehearing (Petition, 19a, 20a), and on which it fully supported its order in the Court below.

CONCLUSION

For the reasons stated in the Petition and herein, this Court should grant a writ of certiorari, and thereupon forthwith reverse the judgment of the Court below.

Respectfully submitted,

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6. Here failure to object to the Commission's interpretation of a document made apparent only on the order denying rehearing was held to be reasonable.